

Comments Submitted in Response to "Provisions for Reasonable Security"  
7 CFR Part 205, [TM-00-07], RIN 0581-AA40

Submitted by:

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CFSA is very concerned about the financial liability we will incur if USDA's requirements for provision of reasonable security are not scaled to the size and purpose of the organizations providing certification services. Because we are a nonprofit organization whose certification program is operated as a service to farmers in North and South Carolina, our goal has been to operate a quality program that is affordable to small farmers. Our willingness to serve in this capacity has encouraged the growth of organic production and helped support small family farms in the area we serve. We feel that it is inappropriate for the national organic program to be structured in a way that not only prohibits us from realizing our goal, but also jeopardizes what we have accomplished in the seventeen years we have been providing organic certification.

However, we also understand that all farmers are entitled to quality certification services, and we encourage USDA's efforts to provide "provisions for reasonable security" to the extent that such provisions help insure that certification agencies are managed in a responsible, professional manner. Again, we feel that it is imperative that the provisions for providing that security are scaled to the size and purpose of the certification agency. This means that the amount of any bonds or insurance coverage required by USDA should be dependent upon some scaling factor such as number of operations certified, acreage certified, or gross sales of certified operations. Since the liability associated with processing of organic products is higher than that from production, it also seems reasonable that financial requirements be stricter for agencies that certify large numbers of processors.

Below is a table formatted to address some of the questions posed by USDA. The table also includes answers to some questions not asked by USDA, but that are critical to assessing whether risks are associated with the certification activity specifically, whether the customer is entitled to protection from the risk (or financial compensation if the risk is realized), and whether USDA should be involved in helping to protect the customer against a particular type of risk. By not asking these additional questions, USDA assumes that the customer should be protected from ALL risks associated with certification, compensated for any risk realized, and that USDA should play a role in mitigating ALL of the risks associated with doing business with a certification agency.

What risks might a customer face when dealing with a certification agency? (USDA question 1)	Is the risk particular to the certification activity, or simply the risk associated with purchase of any ongoing service?	Is there some protection available for the customer or certification agency to mitigate the risk?	Is the customer entitled to some compensation from the certification agency if the risk is realized? (USDA question 5)	Is some financial compensation or guarantee necessary to protect the interest of the certification agency or customer? (USDA question 5)	What mechanism or instrument can provide the needed financial security for the agency or customer? (USDA question 2)
Loss of potential income when certification is not granted or renewed in a timely manner	The risk is similar for purchase of any product or service	Customers have the option of choosing among certification agencies based on reputation and past performance.	No	No	None
Failure of certification agency due to poor management (but accredited until business closes, so the certification is still valid)	The risk is similar for purchase of any product or service	Customers have the option of choosing among certification agencies based on reputation and past performance.	Because any certifications issued are still valid, only to the extent that fees for a given certification cycle could be refunded if the certification process is not completed. However, there should perhaps be some guarantee that the certification records will be available to USDA or another certification agency.	Perhaps some mechanism is necessary to guarantee that funds will be available to transfer records (shipping costs, employee costs involved in transfer of records)	A bond to USDA or a state agriculture department to guarantee the money necessary to transfer records is available.
Failure of certification agency due to loss of USDA accreditation	This is a risk particular to the certification activity	Customers have the option of choosing among certification agencies based on reputation and past performance.	Only to the extent that fees for a given certification cycle could be refunded if the certification process is not completed. However, there should perhaps be some guarantee that the certification records will be available to USDA or another certification agency.	Perhaps some mechanism is necessary to guarantee that funds will be available to transfer records (shipping costs, employee costs involved in transfer of records)	A bond to USDA or a state agriculture department to guarantee the money necessary to transfer records is available.
Failure of certification agency due to unforeseen financial burden caused by a lawsuit: lawsuit related to certification issues	Because the lawsuit is related to certification issues, this risk is unique to the certification activity.	Because certification agencies are being forced to adopt a national standard, liability or business failure due to the standards themselves or by a challenge to the standards should be transferred to USDA or state agriculture department. Other risks such as certification of a fraudulently represented product can be mitigated by carrying the appropriate type of insurance.	The customer is not entitled to direct protection.	It is reasonable to expect that the certification agency will protect itself against such issues (thus protecting the customer indirectly). Such protection could be a combination of legal disclaimers and appropriate insurance.	Officers and Directors Insurance to cover the activities of Boards of Directors, Errors and Omissions Insurance to cover the activities of those participating in the certification decision process.

Failure of certification agency due to unforeseen financial burden caused by a lawsuit: lawsuit related to food safety issues	Because standards for certification do not supercede existing laws governing food safety, certifiers should not be liable for such issues. However, one could easily incur the legal costs even if eventually exonerated	Because certification agencies are being forced to adopt a national standard, liability or business failure due to the standards themselves or by a challenge to the standards should be transferred to USDA or state agriculture department. Other risks can be mitigated by carrying the appropriate type of insurance.	The customer is not entitled to direct protection.	It is reasonable to expect that the certification agency will protect itself against such issues (thus protecting the customer indirectly). Such protection could be a combination of legal disclaimers and appropriate insurance.	Officers and Directors Insurance to cover the activities of Boards of Directors, Errors and Omissions Insurance to cover the activities of those participating in the certification decision process.
Failure of certification agency due to unforeseen financial burden caused by a lawsuit: lawsuit related to employee dispute	The risk is similar for purchase of any product or service	Risks can be mitigated by carrying the appropriate type of insurance.	The customer is not entitled to direct protection	It is reasonable to expect that the certification agency will protect itself against such issues (thus protecting the customer indirectly).	Officers and Directors Insurance to cover the activities of Boards of Directors, Errors and Omissions Insurance to cover the activities of those participating in the certification decision process
Failure of certification agency due to unforeseen financial burden caused by a lawsuit: lawsuit related to injury at agency office or at an agency sponsored event.	The risk is similar for purchase of any product or service	Risks can be mitigated by carrying the appropriate type of insurance.	The customer is not entitled to direct protection	It is reasonable to expect that the certification agency will protect itself against such issues (thus protecting the customer indirectly).	Liability insurance for the organization and for particular events can address this issue.

To summarize the points made in the table:

- The only financial guarantees to which a customer is entitled are the refund of certification fees if the certification agency goes out of business or loses accreditation while an application is in review, and a guarantee that certification files will be transferred to a responsible party (a government agency or another certifier) if the certification agency goes out of business or loses accreditation. The refund of application fees is a business transaction rather than an accreditation issue, so USDA should not be involved in guaranteeing fee refunds. This point is particularly important given the wide range of fees charged by certification agencies, and the difficulty associated with determining the size of the bond necessary to cover the refund of fees.
- An appropriate combination of Errors and Omissions, Directors and Officers, and Liability insurance should be sufficient to address most risks that threaten the operation of a certification agency. USDA must accept any liability associated with the standards themselves (to the extent that a government agency can accept liability), and should not play a role in guaranteeing against those risks that are not directly associated with the certification process, i.e. those risks that are incurred by all small businesses.

To address the other questions posed by USDA:

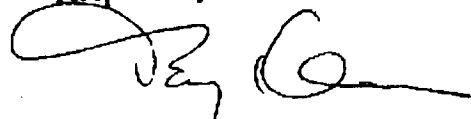
Question 3: Because most of the risks that can be mitigated are associated with the financial consequences of becoming embroiled in a lawsuit, coverage could be based on typical awards in cases similar to those in which certifiers could become involved. Coverage required must be scaled to the degree of risk involved. Large certifiers, agencies certifying large numbers of processing operations, and agencies certifying in multiple "jurisdictions" (especially other countries) will have much higher risk, not only because of the type and number of operations they certify, but also because of the "deep pockets" issue. Small certifiers have some risk, of course, but are not good targets for lawsuits because of their limited financial resources.

Question 4: CFSA currently pays on the order of \$5000/yr for errors and omissions, officers and directors, and liability insurance policies. While the costs of the officers and directors and liability insurance are borne in part by activities other than certification, the errors and omissions policy for which we pay ~\$3700/yr is charged entirely to our certification budget. This policy covers all participants in the certification decision-making process, including our Board of Directors, staff, volunteers, and independent contractors (inspectors).

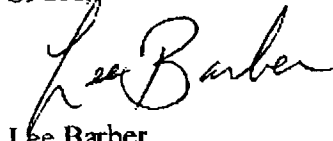
Question 6: If a certification agency is somehow protected from lawsuits, then there is no need for that organization to have the corresponding insurance coverage. However, the legal protection may not be sufficiently comprehensive: a certifier may be protected from lawsuits related to injury or actions of its Board, but not the type of lawsuit addressed in the coverage provided by errors and omissions insurance. Duplicate coverage is not necessary, but all of the relevant liability issues should be addressed with either legal protection or insurance coverage.

There may also be a level of risk below which insurance coverage is not needed or is not cost effective. If, for example, most of the clients of a certification agency are producers just over the limit for certification (>\$5000/yr of organic sales), the cost of insurance coverage could force the certifier to raise certification fees beyond the level of affordability for the producers. The certifier would then have adequate insurance coverage, but certify no farms. In such circumstances, small certifiers should be able to obtain a variance from the "provisions for reasonable security" as long as all operations applying for certification were made aware of the lack of insurance coverage. The "waiver point" could be determined relative to a program's operating expenses. If, for instance, the cost of appropriate insurance coverage is more than 10% of a certification program's operating budget, the program is eligible for a waiver from provisions for reasonable security.

Respectfully submitted on behalf of the members of CFSA,



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